Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term 2003

BILLY LEWIS,

Petitioner,

v.

BANK OF AMERICA, N.A.,
AND MARK THOMASON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY W. HELLBERG, JR.*
Counsel of Record
STEPHEN W. BURNETT

Flanary Carter Schubert, P.C.
900 Jackson Street, Suite 600
Dallas, Texas 75202
(214) 397-0333 (office)
(214) 397-0222 (facsimile)

WILLIAM A. ROBERTS
KYLE COLEMAN

The Roberts Law Firm
16250 Dallas Pkwy, Suite 105
Dallas, Texas 75248
(972) 661-1040 (office)
(972) 930-0999 (facsimile)

Attorneys for Petitioner

*a member of the
Supreme Court bar

QUESTIONS PRESENTED FOR REVIEW

1. Does the Seventh Amendment require courts to follow the standard set forth by this court in *Reeves* when reviewing the sufficiency of a jury's findings on common law claims?

2. Did the Fifth Circuit in reversing the findings of the jury apply an improper standard under the Seventh Amendment and *Reeves* when it viewed the evidence in its entirety, giving weight to evidence it was required to disregard, and disregarding evidence it was required to accept as true?

LIST OF PARTIES

In addition to the parties identified in the caption of this Petition for Writ of Certiorari, the following were parties to the proceedings below:

Walter Smith
Sally Walters

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The Petitioner, Billy Lewis, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit, and states the following:

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit (Appendix p. 10) may be found at *Lewis v. Bank of America, N.A.*, 343 F.3d 540 (5th Cir. 2003). The Opinion on Petition for Rehearing (Appendix p. 34) may be found at *Lewis v. Bank of America, N.A.*, 347 F.3d 587 (5th Cir. 2003).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered September 2, 2003, and the Motion for Rehearing of Petitioner was denied October 6, 2003. This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50(a)(1), Federal Rule of Civil Procedure:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION

The district court had supplemental jurisdiction of Petitioner's state law claims pursuant to 28 U.S.C. § 1367, even though Petitioner withdrew his claims under 29 U.S.C. § 1001, *et seq.* ("ERISA"). *See also,* Appellate Record ("A.R.") pp. 4453-54. The Fifth Circuit had jurisdiction of the appeal from a final judgment of the district court pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

The underlying suit concerns a loan contract between petitioner, Billy Lewis ("Lewis"), and Bank of America, N.A., formally known as NationsBank ("BOA"). Lewis entered into the contract because he desired to finance a company started by his son. BOA, through its agents, represented to Lewis that entering into the contract would not be a taxable event.

After working for 34 years, Lewis had accumulated retirement savings primarily through two different avenues, a Defined Benefit Plan and a 401(k) savings account. It was with these funds that Lewis planned on assisting the financing of his son's new company. In 1993, Lewis turned to BOA for guidance and aid in accomplishing this task. BOA insisted that Lewis withdraw funds from his Defined Benefit Plan and 401(k), and deposit those funds at BOA, as collateral for loans to his son's business. BOA assured him that such actions

would not be a taxable event for Lewis. Based upon and because of these assurances, Lewis complied with BOA's request that he transfer the money to BOA. BOA then placed the money received from Lewis into a non-IRA Certificate of Deposit ("CD").

Subsequent to the transaction, Lewis received a notice of deficiency from the Internal Revenue Service ("IRS") in the amount of $700,000. The IRS asserted that the transfer of funds from the Defined Benefit Plan and 401(k) to BOA was a taxable event because the transfer was to a "non-IRA CD." Ultimately, in a negotiated settlement between Lewis and the IRS, Lewis reduced his liability to the IRS to $323,000.

Lewis then filed suit against Defendant BOA and others and asserted a number of causes of actions, including common law claims for breach of contract and fraudulent inducement based upon the representations by BOA and its agents, including Mark Thomason ("Thomason"), Sally Walters and Walter Smith[1], that the funds Lewis transferred from his Defined Benefit Plan and 401(k) to BOA would retain their tax deferred status.

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[1] The district court below granted a judgment as a matter of law on Lewis' claims against Walters and Smith. That ruling is not challenged in this Petition.

THE TRIAL

A. Stipulations

The following are among the stipulations that were read to the jury at the beginning of the trial:

> On July 1, 1999, Nationsbank merged into Bank of America. Bank of America is the surviving corporation.
>
> Billy Lewis was born on February 7, 1936. He graduated high school. Beginning in 1958, Mr. Lewis was employed by the Capital Wire and Cable Corporation located in Plano, Texas. Mr. Lewis started on the factory floor. Mr. Lewis eventually became vice president of purchasing for Capital Wire and Cable. Mr. Lewis became an officer of the corporation and a director of the corporation. Mr. Lewis and four other men were the initial shareholders in Capital Wire and Cable.
>
> In 1988, General Cable Corporation purchased Capital Wire and Cable for $1,000,000. Mr. Lewis became vice president of purchasing for General Cable Corporation. He continued to hold that position until his retirement with the corporation in 1992.
>
> While Mr. Lewis was employed at General Cable, he became a participant in the General Cable Employee Stock Ownership and Savings Plan. . . .

Mr. Lewis participated in the plan until his retirement. When he retired, Mr. Lewis had accumulated a balance of $95,184.60 in the General Cable Plan.

***

Now, in 1986, Mr. Lewis started a second business. That business was known as the Billy Lewis Sales Company. . . . Mr. Lewis established a defined benefit plan for the Billy Lewis Sales Company. A defined benefit plan is another method by which an employee may defer until retirement paying the income taxes on income or compensation and earnings thereon.

***

By the end of 1991, there was over $428,000 in assets in the defined benefit plan.

***

Also, in 1992, Mr. Lewis' son, Kirk, started a business known as Eau De Vie, Inc.

***

Eau De Vie did business under the name of Spirits Liquors, and was organized to be a wholesale and retail liquor business.

Mr. Lewis wished to help his son and his business. Mr. Lewis offered to find financing for the business. Beginning in December 1992 there were discussions between Mr. Lewis and representative of [BOA]. As a result of those discussions, which are disputed, approximately $528,000 was transferred to [BOA] in a series of transfers. [BOA] placed these funds in certificates of deposit.

> The certificates of deposit were used as collateral for a loan by [BOA] to Eau De Vie. It was agreed between [BOA], Eau De Vie, and Lewis that the interest on the loan would be two percent more than the rate of return on the certificates of deposit.
>
> ***
>
> Beginning in April 1993, Mr. Lewis retained the services of Albert ("Bud") Lowry, a Certified Public Accountant for tax and accounting services. In early 1994, Mr. Lowry began to prepare the income tax returns for Billy Lewis and his wife and for Eau De Vie. In that process, Mr. Lowry contacted [BOA] to obtain documents which would demonstrate that the transfers from Shearson Lehman Brothers and the General Cable 401(k) plan were 'rollovers.' At the time he made the request, it was Mr. Lowry's position that the transfers were in fact rollovers. [BOA] did not agree and would not provide the requested documentation.
>
> ***

Reporter's Record ("RR") Vol. I, pp. 149:24 - 156:8.

B. Testimony

During the trial, Lewis provided the following testimony:

> Q: (Lewis' Attorney) **What did [Thomason] say when you told him you had a defined benefit plan?**

A: (Lewis) He jumped right on it and said, **I'll take it** and place it in CD's (sic) and charge you two percent interest.

Q: Did you tell him where the defined benefit plan was?

A: Yes, I told him it was currently at Smith Barney.

Q: Did he ask what it was invested in?

A: Not at that time. He did later.

Q: Okay. Well how much later did he ask that?

A: Well, about a couple of hours later, he called me back after we'd left the meeting and asked me what it was invested in.

Q: And what did you tell him?

A: I told him that it was invested in stocks and bonds.

Q: What did he tell you to do?

A: He said, you're going to have to sell the stocks and bonds and bring me liquid collateral.

Q: And what was the deal he offered you?

A: The deal was a two-percent interest over the value of the CD's (sic) that would be paid to me.

Q: Okay. In that initial conversation, **did you ask him, will this remain in a tax exempt status?**

A: **Yes,** I did.

Q: And what did he say?

A: **He assured me it would.**

RR pp. 167:8 - 168:8 (emphasis supplied).[2]

Of significance, there is no evidence or testimony that contradicts the above testimony.[3] In other words, the only evidence was that BOA represented to Lewis that the transfer would be tax-exempt.

Lewis further testified that he believed that the money was going into IRA CDs:

Q: (Lewis' Attorney) At the time that money was transferred, just so we are clear on this, you thought it was going to IRA CD's (sic)?

---

[2] The uncontradicted evidence further established that James F. Chambers, II, the "top person for loans in Texas" (RR p. 398:9-10), instructed Sally Walters to obtain a signed letter from Lewis stating that he will "buy/pledge a non-IRA CD." RR p. 402:7-15. Sally Walters did not disclose to Lewis that the loan could be approved only with a non-IRA CD. Instead, she drafted a letter stating that the collateral must be in a "form satisfactory to [BOA]." RR pp. 406:25 - 407:14.

[3] Mr. Thomason testified that "I can't say I discussed tax implications [with Mr. Lewis]." RR p. 512:20.

A: (Lewis) Yes, sir.

RR pp. 185:24 - 186:1.

***

Q: (Lewis' Attorney) Did you understand that, by doing this, you were going to make it taxable?

A: (Lewis) No, sir, not at all.

RR p. 168:22-24.

***

Q: (Lewis' Attorney) Did anyone at [BOA]–I mean, you were asked did anybody give you tax advice. Did anyone at [BOA] tell you, if you pledge this money as collateral, it will be taxable even if it's in an IRA?

A: (Lewis) No, sir, they did not.

RR p. 314:18-22.

***

Q: (Lewis' Attorney) You were asked if you wanted to provide your son collateral for his business loan, and you said yes.

A: (Lewis) Yes, this is correct.

Q: Would you have provided collateral if you knew it took--changed your IRA to a taxable IRA?

A: Absolutely not. I would not have paid [BOA] two-percent interest knowing that I had to pay taxes anyhow. That's ridiculous.

RR p. 315:8-12.

C. The Verdict

At the conclusion of the evidence, the district court presented interrogatories to the jury, and the jury responded by finding that BOA and Thomason fraudulently induced Lewis to withdraw funds from his Defined Benefit Plan and 401k and place it in non-tax deferred CDs at BOA. Specifically, the jury answered every question in Lewis' favor and found that every element of fraudulent inducement and breach of contract had been proven. *See* Appendix pp. A 2-5. The jury further awarded Lewis damages in the collective amount of $380,101.75. Appendix pp. A 6-7.

On April 9, 2002, the district court below entered its Amended Final Judgment against BOA and Thomason based upon the Verdict. Appendix p. A 8. The district court denied BOA's and Thomason's Motion for Judgment as a Matter of Law and Renewed Motion for Judgment as a Matter of Law.

THE APPEAL

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the Amended Final Judgment and rendered a take nothing judgment on both Lewis' breach

of contract and fraudulent inducement claims. *See* Appendix p. A 10.

In doing so, the Fifth Circuit initially determined, among other things, that: (i) Lewis' testimony regarding uncontradicted statements made to him regarding the tax consequences of the transaction were insufficient to demonstrate that an affirmative misrepresentation was made to him; and (ii) viewing the circumstances in their entirety, a reasonable jury could not have found that Lewis actually and justifiably relied on any misrepresentation by BOA and Thomason because of "red flags," Lewis' access to tax professionals, the amount involved and the ambiguous assurances by Thomason. Appendix pp. A 20-22.

To the contrary, in a dissenting opinion, Circuit Judge Garza concluded that Lewis presented sufficient evidence on every element of his fraudulent inducement claim. Appendix p. A 24. In particular, Judge Garza determined that the issue of justifiable reliance is a close question in this case and that the majority lost sight of the traditionally deferential standard of review for jury verdicts, and the court's duty to draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the non-moving party. Appendix pp. A 30, A 33.

Upon reconsideration, the Fifth Circuit concluded that even if the Defendants knew of the tax consequences of the transaction, and failed to disclose those tax consequences, Lewis was not justified in relying on

Defendants' non-disclosure of tax advice. Appendix p. A 36.

REASONS FOR GRANTING THE WRIT

A WRIT IS NECESSARY TO MAKE CLEAR THAT THE SUFFICIENCY REVIEW STANDARD SET FORTH BY THIS COURT IN *REEVES* APPLIES TO COMMON LAW CLAIMS

This Court should hear this case for two reasons. First, it needs to make clear that the sufficiency review standard enunciated in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), applies to common law causes of action, such as fraud, just as it does to claims brought under Federal statutes. There is no reason that the same standard should not apply in both situations. After all, Rule 50 of the Federal Rules of Civil Procedure applies to all cases brought in federal district courts. Moreover, the *Reeves* standard ultimately is designed to protect a litigant's Seventh Amendment right to a trial by jury. Such right exists, and must be protected, notwithstanding the particular cause of action being asserted by the plaintiff.

Second, in spite of this Court's pronouncement in *Reeves*, there is still disagreement among the Circuit Courts as to the proper standard of review for motions for judgment as a matter of law. For example, the Seventh Circuit held that it would review a motion for judgment as a matter of law *de novo*. *Appelbaum v. Milwaukee Metropolitan Sewerage District*, 340 F.3d 573 (7th

Cir. 2003). However, in following *Reeves*, the Seventh Circuit added that "we must construe the evidentiary record in Appelbaum's favor, drawing all reasonable inferences in her favor and resisting the temptation to weigh the evidence or to make our own credibility determinations." *Id.* (citing *Reeves*, 530 U.S. at 150-51). In this case, on the other hand, the Fifth Circuit applied a *de novo* standard, but made no mention of drawing all reasonable inferences in favor of Lewis or disregarding evidence in favor of BOA. Appendix p. A 15.

In fact, the Fifth Circuit did the exact opposite in this case. For instance, the Fifth Circuit wrote that the record is devoid of evidence that Lewis perceived Thomason to be an expert in tax law or investment planning. Appendix p. A 21. However, an inference can be drawn that Lewis did consider Thomason such an expert since Lewis asked his advice on tax law and investment planning. The jury obviously drew such an inference and the Fifth Circuit, under *Reeves* and consistent with *Appelbaum*, should have drawn the same inference since it was favorable to Lewis. On the other hand, the Fifth Circuit considered evidence favorable to BOA when it cited to the fact that Lewis had access to tax professionals. Appendix p. A 22, n.6. Under *Reeves*, the Fifth Circuit should have ignored this piece of evidence because it favored BOA, not Lewis. The Circuit courts, apparently, are still confused as to what evidence and inferences they should consider and what evidence they should ignore in reviewing a motion for judgment as a matter of law. Some courts, such as the Seventh Circuit, draw all reasonable inferences in favor of the non-movant; some

courts, such as the Fifth Circuit, reject evidence favorable to the non-movant and consider evidence favorable to the movant.

THE FIFTH CIRCUIT APPLIED AN IMPROPER STANDARD IN REVIEWING THE EVIDENCE AND EXAMINING THE JURY'S VERDICT, ALL OF WHICH VIOLATES LEWIS' SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY.

At the outset, it is important to understand the framework and limitations mandated by the United States Constitution and this Court within which the Fifth Circuit was required to review the Amended Final Judgment of the district court below.

Under Article VII of the United States Constitution, a litigant has a right to a jury trial in all suits at common law where the value exceeds twenty dollars. This right extends to legal and equitable claims joined in the same action. *See Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 550 (1990). *See also, Parsons v. Bedford, Breedlove and Robeson*, 28 U.S. 433 (1830).[4] Furthermore, "[t]he right to a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. It was long ago that this Court stated that the right to a jury trial is a great

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[4] A claim of fraudulent inducement, which is the claim at issue here, is a common law claim. *See U.S. Quest, Inc. v. Kimmons*, 288 F.3d 399, 406 (5th Cir. 2000).

constitutional right. *Grand Chute v. Winegar*, 82 U.S. 373 (1872).

In *Tennant v. Peoria & P.U. Railway Co.*, 321 U.S. 29 (1944), this Court explained the standard for reviewing a sufficiency challenge:

> It is not the function of a court to search the record for conflicting evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury.
>
> **It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts.**
>
> The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (citations omitted).
>
> That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Tennant, 321 U.S. at 35 (emphasis supplied). *See also, Reeves*, 530 U.S. at 149; *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

In the present case, the Fifth Circuit reviewed *de novo* the district court's ruling on BOA's and Thomason's Motion for Judgment as a Matter of Law. *See*, Appendix p. A 15; *Delano-Pyle v. Victoria County*, 302 F.3d 567, 572 (5th Cir. 2002). The Fifth Circuit concluded that BOA and Thomason fully complied with Rule 50, FED. R. CIV. PROC.[5], and determined, among other things, that notwithstanding Lewis' testimony, Lewis did not present sufficient evidence of justifiable reliance. Appendix p. A 22.

When an action is tried by a jury, a motion for judgment as a matter of law is a challenge to the legal sufficiency of the evidence supporting the jury's verdict. *Mississippi Chemical Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 365 (5th Cir. 2002); *See also, Reeves*, 530 U.S. at 150. A court should review all of the evidence in the record when entertaining a motion for judgment as a matter of law. *Reeves*, 530 U.S. at 149.

Judgment as a matter of law is only appropriate if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a)(1). There is no legally sufficient evidence

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[5] Petitioner does not challenge in this proceeding the Fifth Circuit's determination of Respondent's compliance with the technical preservation of error requirements under FED. R. CIV. PROC. 50.

when the "facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict." *Wallace v. Methodist Hospital System*, 271 F.3d 212, 219 (5th Cir. 2001)(citations omitted). When making this determination, the court must "draw all reasonable inferences in favor of the nonmoving party, and [the court] may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. 150 (citations omitted). As further stated by this Court, "[c]redibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

The reviewing court must always keep in mind that the standard of review of a jury verdict is especially deferential and the court will reverse only if no reasonable jury could have arrived at the verdict. *Mississippi Chemical*, 287 F.3d at 365 (citations omitted).

In the present case, the Fifth Circuit violated Lewis' Seventh Amendment rights when it improperly made credibility determinations, weighed the evidence and emphasized alternative inferences which are suggested by the absence of evidence. *See Reeves*, 530 U.S. at 150; *Sentilles; Tennant.* In particular, the Fifth Circuit reviewed the testimony that was presented to the jury with respect to Thomason that "assured" Lewis that the money transferred to BOA would retain tax-exempt status and concluded that this statement was ambiguous and insufficient to support a jury verdict. Appendix pp. A 20-

21. Based on this testimony, the jury determined that this "assurance" was a misrepresentation by BOA to place the transferred funds into tax-deferred IRA CDs. Appendix pp. A 2-3.

However, the Fifth Circuit focused its attention on the omission of specific details surrounding the "assurance" by Thomason and concluded that "it is not clear whether the parties were discussing the tax consequences of the loan transaction as a whole." Appendix p. A 20.[6] Often, the context of a statement can be garnered from the tone of a witness' voice or body language, something a jury observes, but does not appear in a reporter's record.

At trial, any ambiguity regarding the statements by Thomason to Lewis was resolved by the jury in favor of Lewis. The Fifth Circuit overstepped its role when it abandoned the well established standard for reviewing a verdict for legal sufficiency when it resolved the perceived ambiguity and all inferences surrounding the "assurance" *against* Lewis, and declared that Lewis' testimony was "insufficient to meet [the] minimum standard." Appendix pp. A 21. Under the legal sufficiency review standards, if a fact is not "clear" but an

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[6] Notably, the Fifth Circuit states that Lewis' testimony regarding the "assurance" he received from Thomason is insufficient to establish that a representation of the tax consequences was made to Lewis (Appendix pp. A 20-21), but in the same opinion relies upon "the ambiguous nature of Thomason's 'assurance'" as evidence that Lewis was on notice of a "red flag" warranting further investigation. Appendix p. A 22.

inference can be drawn to resolve the fact in support of the non-movant, then the reviewing court must do so. *Reeves*, 530 U.S. at 150; *Laxton v. Gap, Inc.*, 333 F.3d 572, 577 (5th Cir. 2003). If a party presents probative facts from which each element of his claim could reasonably be inferred, as was done in the district court below, then the issues may properly be presented to the jury. *See Tennant*, 321 U.S. at 32-33.

In this instance, and based on the context of the discussion between Lewis and Thomason, the jury inferred that Lewis' inquiry was about the tax-exempt status of the funds Lewis was transferring to BOA. Not only was this inference reasonable, but it was probably the only possible inference that could have been drawn. Once the jury makes this inference, it was certainly reasonable for it to conclude that BOA and Thomason actively misrepresented the consequences of the transaction.

Thus, the Fifth Circuit, by disregarding Lewis' "conclusory testimony regarding a single, ambiguous statement by Thomason," effectively disregarded the jury's positive determinations regarding Lewis' credibility and veracity, and re-evaluated the weight of the evidence presented at trial. The Fifth Circuit further disregarded additional uncontradicted testimony by Lewis on the issue of the representations made by BOA and Thomason, and Lewis' reliance on those representations, as previously set forth in this Petition and provided by Circuit Judge Garza's dissenting opinion. *See* Appendix pp. A 26, n.9; A 29; A 31, n.10.

In other words , the Fifth Circuit ignored all evidence favorable to Lewis when it should have ignored the evidence favorable to BOA and Thomason. *See Reeves*, 150 U.S. at 151. By disregarding this additional evidence and weighing the evidence, the Fifth Circuit substituted its judgment for that of the jury's in weighing the evidence, and violated Lewis' Seventh Amendment right to a trial by jury. The Fifth Circuit's ruling is not appropriate under the standard established by this Court. *Reeves*, 530 U.S. at 150-51.

In another example of the abandonment of this Court's standards, the Fifth Circuit reviewed the same testimony that was presented to the jury with respect to Lewis' reliance on the alleged misrepresentations by Defendants and concluded that Lewis was not justified in his decision to enter the transaction without undertaking an independent investigation into its tax consequences. Appendix p. A 22. The jury determined that Lewis detrimentally relied upon the representations by BOA when he entered into the transaction. Appendix pp. A 2-3. However, the Fifth Circuit focused its attention on Lewis' business background, familiarity with retirement accounts and access to professional accountants when it determined that Lewis "should have viewed this series of events as a red flag warranting further investigation of the tax consequences of the loan transaction." Appendix p. A 22. Under the standard of review set forth in *Reeves*, "[a]lthough the court should review the record as a whole, it must disregard evidence favorable to [BOA and Thomason] that the jury is not required to believe." *Reeves*, 530 U.S. 151.

In this instance, the jury was entitled to disregard all evidence suggesting that Lewis either received the "red flags," that he was capable of recognizing these "red flags," or that he was not justified in believing the Defendants when they assured him that the transfer of money would not be a taxable event.

There is one particular phrase in the Fifth Circuit's opinion that illustrates the error that has been committed. The Fifth Circuit stated "**[v]iewing the circumstances in their entirety**. . . Lewis' decision to enter into the transaction without undertaking additional investigation into its tax consequences was not justifiable." Appendix p. A 22 (emphasis supplied).

In order to "[view] the circumstances in their entirety," the Fifth Circuit must have weighed the evidence and inferences, judged the credibility of the witnesses and determined the ultimate conclusions as to the facts, all of which is prohibited by the Seventh Amendment. Quite simply, the Fifth Circuit deprived Lewis of his constitutional rights when it weighed the evidence and substituted its judgment for that of the jury.

By independently reviewing and evaluating the evidence presented at trial, and weighing the credibility of Lewis as a witness, the Fifth Circuit overstepped its role as an appellate court in violation of the Seventh Amendment and the Federal Rules of Civil Procedure. When evidence of every element, including reliance, of a *prima facie* case of fraudulent inducement has been presented to a jury, it is in the province of the jury, not

the Fifth Circuit, to weigh that evidence and to decide whether Lewis' actions were justified when BOA and Thomason represented that there would be no tax consequences to the transaction.

CONCLUSION

For the reasons stated above, Lewis respectfully prays that this Honorable Court issue its Writ of Certiorari to the Court of Appeals for the Fifth Circuit, and, upon review, reverse the Judgment and Opinion of the Court of Appeals for the Fifth Circuit and render judgment on the verdict, with costs taxed against Respondents.

Respectfully submitted,
Jeffrey W. Hellberg JK.

JEFFREY W. HELLBERG, JR.
Counsel of Record
STEPHEN W. BURNETT
FLANARY CARTER SCHUBERT, P.C.
900 Jackson Street, Suite 600
Dallas, Texas 75202
(214) 397-0333 (office)
(214) 397-0222 (facsimile)

WILLIAM A. ROBERTS
KYLE COLEMAN
THE ROBERTS LAW FIRM
16250 Dallas Parkway, Suite 105
Dallas, Texas 75248
Attorneys for Petitioner
Billy Lewis

APPENDIX A - VERDICT OF THE JURY IN THE UNITED STATES DISTRICT COURT DATED MARCH 14, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

BILLY LEWIS,	§	
Plaintiff,	§	
v.	§	CIVIL
	§	ACTION NO.
BANK OF AMERICA, N.A., f/k/a	§	3:97-CV-
NATIONSBANK OF TEXAS, N.A., et al.,	§	0011-J
	§	
Defendants.	§	

VERDICT OF THE JURY

We, the jury, have unanimously agreed to the answers to the attached questions and return such answers in open court, and under the instructions of the Court, as our verdict in this cause.

s/ Jeffrey L. Lovelace
FOREPERSON
JEFFREY L. LOVELACE

DATE: 3/14/02

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Question No. 1

Do you find that defendants fraudulently induced Billy Lewis to withdraw funds from the Billy Lewis Sales Company Defined Benefit Plan and place it in non-tax deferred CDs at NationsBank?

Answer "Yes" or "No" as to each:

Mark Thomason: Yes
NationsBank: Yes

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Question No. 2

Do you find that defendants fraudulently induced Billy Lewis to place funds from the General Wire and Cable 401k Plan in non tax deferred CDs in NationsBank?

Answer "Yes" or "No" as to each:

Mark Thomason: Yes
NationsBank: Yes

Question No. 3

Do you find the NationsBank agreed to place the funds from the Billy Lewis Sales Company Defined Benefit Plan in tax-deferred IRA CDs in NationsBank?

Answer "Yes" or "No": Yes

Question No. 4

Do you find that NationsBank agreed to accept a rollover of Billy Lewis' General Wire and Cable 401K and place the funds in tax-deferred IRA CDs?

Answer "Yes" or "No": Yes

If you have answered Question No. 1 or No. 3 "Yes," answer the following question; otherwise, do not answer the following question.

Question No. 5

Find from a preponderance of the evidence the damages, if any, that were proximately caused by the fraudulent inducement if you have found it in Question No. 1 or the failure to perform the agreement if you have found the agreement in Question No.3.

Consider the following and none other: the additional tax, penalty, or interest, if any, and the reasonable and necessary accountant's fees, if any, incurred by Lewis to reduce those damages.

Answer in dollars and cents, if any, or none.
$ 296, 461.30

If you have answered Question No. 2 or No. 4 "Yes", answer the following question; otherwise, do not answer the following question.

Question No. 6

Find from a preponderance of the evidence the damages, if any, that were proximately caused by the fraudulent inducement if you have found it in Question No. 2 or the failure to perform the agreement if you have found the agreement in Question No. 4.

Consider the following and non other: the additional tax, penalty, or interest, if any, and the reasonable and necessary accountant's fees, if any, incurred by Lewis to reduce those damages.

Answer in dollars and cents, if any, or none.

$ 83,640.45

APPENDIX B - FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, DATED APRIL 9, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

BILLY LEWIS,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL
	§	ACTION NO.
	§	3:97-CV-
	§	0011-J
BANK OF AMERICA, N.A., f/k/a	§	
NATIONSBANK OF TEXAS, N.A., et al.	§	
Defendants.	§	

AMENDED FINAL JUDGMENT

The above-styled cause of action having come on for a trial before a jury and the jury having found for the Plaintiff, and the Court having duly received and entered the jury's verdict and entered its Memorandum Opinion and Order, it is therefore

ORDERED, ADJUDGED, and DECREED that plaintiff have and recover the sum of $380,101.75, as awarded by the jury; and it is

FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff shall recover pre-judgment interest in the amount of $209,732.86 and post-judgment interest at the rate of 2.66% computed daily and compounded annually from the date of this Judgment until the Judgment is paid in full, as provided by 28 U.S.C.§ 1961. Plaintiff shall recover his costs of this suit.

All relief not expressly granted herein is denied.
It is SO ORDERED.

Signed this the 9th day of April, 2002.

s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

APPENDIX C - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED SEPTEMBER 2, 2003

UNITED STATES OF COURT OF APPEALS FOR THE FIFTH COURT

No. 02-10605

BILLY LEWIS,
Plaintiff - Appellee/Cross - Appellant,

VERSUS

BANK OF AMERICA NA, Etc; ET AL,
Defendants,

BANK OF AMERICA NA, formerly known as Nationsbank of Texas NA; MARK THOMASON; WALTER F. SMITH, JR.; SALLY WALTERS,
Defendants - Appellants/Cross - Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before: DAVIS, CYNTHIA HOLCOMB HALL*, and EMILIO M. GARZA, Circuit Judges.

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*U.S. Circuit Judge, Ninth Circuit, sitting by designation.

Opinion by Judge Hall; dissent by Judge Garza.
HALL, Circuit Judge:

Bank of America, formerly known as NationsBank of Texas ("the Bank"), and its former employee, Mark Thomason, appeal a jury verdict holding them jointly liable for fraud and breach of contract and awarding damages of $380,101.75 to Billy Lewis. Lewis cross-appeals, arguing that the jury instructions improperly limited the scope of compensable damages. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we REVERSE.

FACTS

1. Billy Lewis' Defined Benefit Plans

Billy Lewis was employed by the General Cable Corporation ("General Cable") from 1958 to 1992.[1] During his employment with General Cable, Lewis participated in the General Cable 401(k) defined benefit retirement savings plan, accumulating a balance of $96,200.71. In 1986, Lewis founded the Billy Lewis Sales Company, a plastics trading business. In connection with this business, Lewis created a second defined benefit plan. By 1991, Lewis had accumulated a balance of approximately $428,000 in his Billy Lewis Sales Company defined benefit plan.

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[1]Prior to 1988, General Cable was known as "Capital Wire and Cable Corporation."

2. Loan Negotiations Between Lewis and the Bank

In 1992, Lewis's son started Eau De Vie., Inc., a wholesale and retail liquor business operation as "Spirits Liquor." In order to help his son's new business obtain financing, Lewis contacted the Bank to discuss the possibility of a $100,000 loan. The Bank arranged a meeting at the Spirits Liquor facility between Lewis and loan officer Mark Thomason. During this meeting, Lewis offered to pledge either the Spirits Liquor inventory or his personal land holdings as collateral. Thomason rejected both suggestions, and informed Lewis that the Bank would be willing to execute the proposed loan only on a cash-secured basis. Thomason proposed that Lewis liquify his defined benefit holdings and place the funds into CDs at the Bank.[2] Thomason told Lewis that, by doing so, the funds could be used as collateral for a loan at the rate of two percent over the rate of return of CD.

Lewis agreed to the terms offered by Thomason, and entered into a written loan agreement with the Bank. The documents forming the written loan agreement between Lewis and the Bank included a letter requiring Lewis to secure the loan with collateral "in a form satisfactory" to the Bank. Between December 10, 1992, and January 21, 1993, Lewis transferred a total of $528,496.76 from his Billy Lewis Sales Company defined benefit plan to the Bank. On January 4, 1993, the Bank issued a $100,000

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[2] Lewis contends that Thomason told him that his funds would be placed into tax-deferred IRA CDs. Thomason denies making such a representation.

loan to Lewis for the Spirits Liquor business. Shortly thereafter, the Bank agreed to provide additional financing to Spirits. By January 28, 1993, the loan balance $528,000. On August 12, 1993, Spirits Liquor sought an additional $100,000 loan to cover an overdraft on the company's checking account. Lewis agreed to secure the loan by transferring funds to the Bank from his General Cable 401(k) plan. Between August 19, 1993, and October 5, 1993, Lewis withdrew a total of $96,200.71 from his General Cable 401(k) plan and used the funds to purchase CDs at the Bank.

Lewis maintained the CDs until 1996, when Spirits Liquor concluded its relationship with the Bank. Lewis redeemed the CDs at that time, using the proceeds to satisfy the outstanding balance on the Spirits Liquor loans.

3. Tax Consequences of the Spirits Liquor Loans

In early 1994, Lewis's accountant Bud Lowry discovered a series of 1099 tax forms characterizing Lewis's 1992 and 1993 withdrawals from his Billy Lewis Sales Company and General Cable 401(k) retirement plan as taxable income. Lowry immediately contacted the Bank to request written documentation that the funds had been transferred to tax-deferred IRA accounts at the Bank. The Bank refused the request, and notified Lowry that Lewis's funds were held in non-IRA CDs. Lowry's subsequent attempts to obtain documents designating Lewis's accounts as IRA CDs were similarly unsuccessful.

When Lewis filed his 1993 tax return, he did not declare the withdrawals from his defined benefit plans as income.

In the Spring of 1996, Lewis received a notice of deficiency from the IRS in the amount of approximately $700,000.[3] Subsequent negotiations between the IRS and Lewis's accountants ultimately resulted in a settlement reducing Lewis's liability to $323.000.

4. Procedural History of the Instant Lawsuit

On August 1, 1996, Lewis filed a complaint in Dallas County District Court. On December 4, 1996, Lewis amended his complaint to allege, inter alia, that the Bank was a custodian of Lewis's defined benefit plan. On January 2, 1997, the defendants removed the action to federal court on the grounds that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA") created federal question jurisdiction. Lewis subsequently amended the complaint to specifically state claims arising under ERISA.

On March 11, 2002, a jury trial commenced in the District Court for the Northern District of Texas. As the conclusion of Lewis's case in chief, Lewis withdrew his ERISA claims. The defendants rested their case, and moved for judgment as a matter of law as to all claims.

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[3]The $700,000 notice of deficiency contained several items related to the Spirits Liquor loan, and several unrelated items. The percentage attributable to the Spirits Liquor loan is not clear from the record.

The district court denied the motion as to the Bank and Thomason, granted the motion as to Bank employees Walter Smith and Sally Walters, and submitted Lewis's fraud and breach of contract claims to the jury.

The jury entered a verdict in favor of Lewis on March 14, 2002. The district court entered judgment on March 29, 2002. On April 8, 2002, the Bank and Thomason renewed their motion for judgment as a matter of law. On April 9, 2002, the district court denied the motion and entered an amended final judgment. Defendants timely appealed.

Standard of Review

We review a district court's ruling on a Rule 50 motion for judgment as a matter of law de novo. Delano-Pyle v. Victoria County, 302 F.3d 567, 572 (5th Cir. 2002). Where, as here, an appellant has fully complied with Rule 50, we review a jury verdict for sufficiency of the evidence. Id.

ERISA Preemption

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Although the term "relate to" is intended to be broad, "pre-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514

U.S. 645, 661 (1995) (internal citation and quotation omitted).

Where, as here, the facts underlying a state law claim bear some relationship to an employee benefit plan, our task is to evaluate the nexus between the state law and ERISA, in view of ERISA's statutory objectives. Travelers, 514 U.S. at 656. Relevant statutory objectives include establishing uniform national safeguards "with respect to the establishment, operation, and administration of [employee benefit] plans," 29 U.S.C. 1001 (a), "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. 1001 (b). Lewis's fraud and contract claims against the Bank, a non-fiduciary,[4] and its employees bear little relationship to these objectives. Congress clearly did not intend to broadly immunize non-fiduciary parties such as the Bank from liability under traditional state law contract and tort causes of action. The district properly determined that Lewis's claims were not preempted.

Breach of Contract

At trial, Lewis argued that the Bank breached an oral contract to place Lewis's funds in tax-deferred IRA CDs. The elements of a breach of contract claim under Texas law are: 1) the existence of a valid contract; 2) performance or tendered performance by the plaintiff; 3) breach of contract by the defendant; and 4) damages to

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[4]Lewis does not challenge the district court's ruling that neither Thomason nor the Bank was a fiduciary.

the plaintiff resulting from the breach. Palmer v. Espey Huston & Associates., 84 S.W. 3d 345, 353 (Tex. App. 2002). The jury entered a verdict in favor of Lewis on the contract claim, finding that the Bank had "agreed to place the funds from the Billy Lewis Sales Company Defined Benefit Plan [and 401 (k) plan] in tax-deferred IRA CDs." On appeal, the Bank contends that the breach of contract claim should not have been submitted to the jury because Lewis did not present evidence that he suffered damages as a result of the alleged breach.

Pursuant to 26 U.S.C. § 408, if an individual pledges an IRA "as security for a loan, the portion so used is treated as distributed to that individual" and is taxed accordingly. 26 U.S.C. § 408 (e) (4). Pledging IRA funds as security for a loan thus has the same tax effect as withdrawing the same funds from an IRA and investing them in non-IRA CDs. Accordingly, the Bank correctly observes that performance of the alleged contract to place Lewis's funds in an IRA account would have created precisely the same mandatory tax consequences as the Bank's alleged breach. Because a causal link to economic damages is a requisite element of an action for breach of contract, the district court erred by submitting the contract claim to the jury.

Fraudulent Inducement

At trial, Lewis argued that the defendants fraudulently induced him "to withdraw funds from the Billy Lewis Sales Company Defined Benefit Plan [and 401 (k) plan] and place it [sic] in non-tax deferred CDs." The

jury entered a verdict in Lewis's favor. The elements of a fraudulent inducement claim are: 1) a material misrepresentation was made; 2) when the misrepresentation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; 3) the speaker made the misrepresentation with the intent that the other party should act on it; 4) the plaintiff detrimentally relied on the misrepresentation. In re FirstMerit Bank, N.A., 52 S.W.3d 749, 758 (Tex. 2001).

In order for a reasonable jury to have concluded that the Bank committed fraud, the jury must have identified a material misrepresentation by the Bank. Lewis's counsel suggested in his closing argument that the relevant misrepresentation was the Bank's alleged statement that it would place Lewis's funds into IRA CDs. If this was the relevant misrepresentation, however, Lewis's fraud claim suffers from a similar defect as his contract claim. As noted above, a pledge of IRA funds as collateral for a loan is treated as a premature withdrawal and renders such funds taxable. 26 U.S.C. § 408 (e)(4). Accordingly, any misrepresentation as to whether Lewis's funds would be deposited in IRA CDs, as opposed to regular CDs, had no practical consequence and was therefore immaterial. See Gen. Am. Life Ins. Co. v. Martinez, 149 S.W.2d 637, 641 (Tex. App. 1941) ("One could hardly be said to rely on an immaterial

misrepresentation. If he does, he is not entitled to relief.").[5]

Lewis also argues that the Bank misrepresented its ability to shelter Lewis from taxes and early withdrawal penalties. As we have previously noted, mere failure to disclose information is not actionable "misrepresentation" under Texas law, absent a fiduciary relationship. Mitchell Energy Corp. v. Samson Resources Co., 80 F.3d 976, 985 (5th Cir. 1996) (citing Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 669 (Tex. App. 1986)). Therefore, Lewis had the burden of proving not only that the Bank failed to disclose the tax consequences of pledging his funds as collateral, but also that the Bank actively misrepresented such consequences, and did so either intentionally or recklessly. Moreover,

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[5]The dissent takes the position that the materiality of a representation should be determined solely by reference to its effect on the recipient. The dissent correctly observes that, under Texas law, a representation cannot be deemed "material" if it has no effect on the plaintiff's actions. See Manges v. Astra Bar, Inc., 596 S.W.2d 605, 611 (Tex. App. 1980) ("In order to show materiality, proof must be made that the misrepresentation induced the complaining party to act."). It does not follow, however, that a plaintiff's decision to react to an otherwise inconsequential representation renders that representation *per se* material. As Texas courts have recognized, "reliance on a misrepresentation is distinct from the materiality thereof, although the distinction may not at all times be clear." Gen. Am. Life Ins. Co. v. Martinez, 149 S.W.2d 637, 641 (Tex. App. 1941).

Lewis bore the burden of proving that he justifiably relied on any such misrepresentation.

The sole piece of evidence that the Bank affirmatively misrepresented the tax consequences of the proposed transaction was the following exchange between Lewis and his attorney:

> Q (Lewis's Attorney) : Okay, in that initial conversation [with Thomason], did you ask him, will this remain in a tax-exempt status?
> A (Lewis) : Yes, I did.
> Q: And what did he say?
> A : He assured me that it would.

Lewis provided no further details about the context of the exchange or the specific nature of Thomason's "assurance." Because Lewis's testimony omitted critical details such as the specific nature of both his inquiry and Thomason's response, it is not clear whether the parties were discussing the tax consequences of the loan transaction as a whole. Notably, Lewis did not testify that Thomason told him his retirement funds could be pledged as collateral without incurring taxes or penalties. Certainly, Lewis did not testify that Thomason represented an ability to circumvent the Internal Revenue Code, which treats the IRA pledges as taxable withdrawals. A fraud claim should not be submitted to a jury unless the plaintiff has presented more than a mere scintilla of evidence that the defendant intentionally or recklessly made a material misrepresentation of fact. FirstMerit, 52 S.W.3d at 758. Lewis's conclusory

testimony regarding a single, ambiguous statement by Thomason was insufficient to meet this minimum standard.

Common law fraud, moreover, requires a plaintiff to show not only that a misrepresentation was made, but also that he or she justifiably relied on the alleged misrepresentation. Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001). The "justifiable reliance" element of common law fraud does not require a plaintiff to demonstrate reasonableness. Field v. Mans, 516 U.S. 59, 70-71 (1995) (citing Restatement (Second) of Torts § 545 A, comment *b*). However, a fraud plaintiff "cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." Id. at 71 (citing Restatement § 541, comment *a*). Moreover, a person may not justifiably reply on a representation if "there are 'red flags' indicating such reliance is unwarranted." In re Mercer, 246 F.3d 391, 418 (5th Cir. 2001) (applying the "justifiable reliance" fraud standard in the federal bankruptcy setting).

The record is devoid of evidence that Lewis perceived Thomason, a loan officer, to be an expert in tax law or investment planning. Nonetheless, according to Lewis's testimony, he blindly relied on Thomason's oral "assurance" by transferring more than $600,000 in funds to the Bank, without requesting written confirmation or consulting with a tax or investment professional. Following his meeting with Thomason, Lewis received a

letter from the Bank summarizing the proposed loan transaction, stating that the collateral must be "in a form acceptable to" the Bank, and making no reference to sheltering Lewis from the tax consequences of the transaction. Subsequently, Lewis signed and executed a series of loan documents, each of which listed his CDs as collateral, and none of which characterized the CDs as IRAs or as tax-deferred. Lewis, an individual with both a business background and familiarity with retirement accounts, should have viewed this series of events as a red flag warranting further investigation of the tax consequences of the loan transaction. Viewing the circumstances in their entirety, including Lewis's access to professional accountants,[6] the amount of money involved in the transaction, and the ambiguous nature of Thomas's "assurance," Lewis's decision to enter into the transaction without undertaking additional investigation into its tax consequences was not justifiable. Accordingly, a reasonable jury could not have found that Lewis actually and justifiably relied on any misrepresentation by the Bank. The district court erred by submitting the fraudulent inducement claim to the jury.

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[6]Our review of the record indicates that Lewis had access to tax professionals during all relevant time periods. Indeed, Lewis and his CPA, Bud Lowry, met with Bank officials during the time period between the original $528,000 loan and the subsequent $100,000 loan.

Conclusion

Lewis failed to present sufficient evidence in support of his breach of contract and fraudulent inducement claims.[7] We REVERSE the judgment in its entirety, and direct the district court to enter judgment in favor of Appellants.

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[7]Because we reverse the judgment in its entirety, we need not address Lewis's contention that the jury verdict improperly limited the jury's consideration of damages. Similarly, we need not address the Bank's additional objections to the verdict form, entry of judgment, and Lewis's closing argument.

EMILIO M. GARZA, Circuit Judge, dissenting in part:

Although I agree with the majority that Billy Lewis ("Lewis") failed to present sufficient evidence in support of his breach of contract claim against Bank of America ("the Bank"), I do not agree that Lewis failed to present sufficient evidence in support of his fraudulent inducement claim.

Contrary to the majority opinion's conclusion, a reasonable jury could have determined that Lewis presented sufficient evidence on every element of his fraudulent inducement claim. *See In re Firstmerit Bank*, 52 S.W3d 749, 758 (Tex. 2001)(elements of fraudulent inducement). From the evidence presented at trial, a reasonable jury could have concluded that the Bank, through its loan officer, Mark Thomason ("Thomason"), falsely assured Lewis that it could accept retirement funds withdrawn from Lewis' defined benefit plan and 401(k) as collateral for a loan, and that those funds would retain their tax-deferred status; that this representation, made by Thomason in his initial conversation with Lewis, was false; that Thomason was at least reckless as to the truth of this representation; that the representation was made with the intent that Lewis should act by transferring his retirement funds to the bank; that Lewis transferred his retirement funds to the bank; and that, as a direct result of his transferring funds from tax-deferred instruments into non-tax-deferred CDs at the Bank, Lewis was injured.

The majority opinion reasons that Lewis failed to present evidence from which a reasonable jury could have concluded that the Bank made a "material misrepresentation." *See In re Firstmerit Bank*, 52 S.W.3d at 758. According to the majority opinion, the relevant misrepresentation–the Bank's alleged statement that Lewis' funds would be placed in tax-deferred IRA CDs–was immaterial solely because pledging IRA funds would be placed in tax-deferred IRA CDs–was immaterial solely because pledging IRA funds as collateral for a loan is treated as a premature withdrawal and renders such funds taxable. It reasons that "any misrepresentation as to whether Lewis' funds would be deposited in IRA CDs, as opposed to regular CDs, had no practical consequence and was therefore immaterial." I disagree. The relevant inquiry concerning the materiality of the alleged misrepresentation is whether, from the evidence presented, a reasonable jury could have concluded that Lewis would not have signed the loan agreement (thereby pledging funds withdrawn from his defined benefit plan and 401(k) as collateral) if Thomason had not represented to Lewis that the funds would be placed in tax-deferred instruments. *See Broaddus Co. v. Binkley*, 126 Tex. 374, 88 S.W.2d 1040, 1042-43 (1936)(reasoning that the test as to whether representations made by a broker to procure the execution of a contract constituted a "material inducement" was whether the contract would have been signed without such representations having been made).[8]

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[8]*See also Manages v. Astra Bar, Inc.*, 596 S.W.2d 605, 611 (Tex. Civ. App.----Corpus Christi 1980, writ ref'd n.r.e)

Lewis' testimony supports that he would not have signed the loan agreement if Thomason had not represented (falsely) to him that his retirement funds would be placed in tax-deferred CDs. Lewis testified that Thomason "assured" him that the funds withdrawn from his defined benefit plan and 401(k) would remain in a tax-exempt status, and that, if he had known that these funds would be taxed if pledged as collateral for the loan, he would not have pledged those funds as collateral in the first place.[9] Thus contrary to the majority opinion's view,

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("In order to show materiality, proof must be made that the misrepresentation induced the complaining party to act."); *Sawyer v. Pierce*, 580 S.W.2d 117, 124 (Tex. Civ. App.----Corpus Christi 1979, writ ref'd n.r.e.) ("In order to make [the misrepresentation] material, proof must be made that it induced the complaining party to enter into the contract."). *See generally Askew v. Smith*, 246 S.W.2d 920, 923 (Civ. App. Tex.----Dallas 1952, no writ) (explaining that, where one of the parties to a contract takes advantage of the other party's ignorance of the law by so misrepresenting the law as to induce such other party to part with rights or property which he might have retained, the misrepresentation is considered such fraud as to justify a court of equity in giving relief).

[9]Lewis testified that, at the time that the money was transferred, he believed that the money was going into IRA CDs:

> Q (Lewis' Attorney): At the time that money was transferred, just so we're clear on this, you thought it was going to IRA CS's?

Lewis' testimony supports that his reliance on Thomason's false "assurance" of tax-exempt status had real financial consequences. The jury believed Lewis. I see no reason why we should second-guess the jury's

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A (Lewis): Yes, sir.

Lewis' testimony also supports that, if Lewis had known that the funds would be taxed if he used them as collateral for the loan, he would not have pledged the funds as collateral:

Q (Lewis' Attorney): Did anyone at NationsBank – I mean, you were asked did anybody give you tax advice. Did anyone at NationsBank tell you, if you pledge this money as collateral, it will be taxable even if it's in an IRA?

A (Lewis): No, sir, they did not.

. . . .

Q: You were asked if you wanted to provide your son collateral for his business loan, and you said yes.

A: Yes, this is correct.

Q: Would you have provided collateral if you knew it took – changed your IRA to a taxable IRA?

A: Absolutely not. I would not have paid the bank two-percent interest knowing that I had to pay taxes anyhow. That's ridiculous.

credibility determination. *See Mississippi Chemical Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 365 (5th Cir. 2002)(explaining that, when reviewing the district court's ruling on a motion for judgment as a matter of law, it is our duty to "draw[] all reasonable inferences and resolv[e] all credibility determinations in the light most favorable to the non-moving party").

In spite of the jury's decision to believe Lewis' testimony, the majority opinion dismisses as insufficient the "sole piece of evidence" supporting that the Bank affirmatively misrepresented the tax consequences of the proposed loan transaction – Lewis' "single, ambiguous statement" at trial that Thomason "assured" him that his retirement funds, once pledged as collateral for the loan, would remain in a tax-exempt status. It reasons that, because Lewis' testimony provided no greater detail about the "context of the exchange or the specific nature of Thomason's 'assurance' . . . it is not clear [from Lewis' testimony] whether the parties were discussing the tax consequences of the loan transaction as a whole." The majority opinion is not correct is dismissing so readily Lewis' testimony concerning Thomason's false "assurance." Viewed in context, it is easy to see that Lewis' testimony regarding Thomason's false "assurance" was made in a conversation between Thomason and Lewis related specifically to the placement of Lewis' retirement funds (to be pledged as collateral) into tax-deferred CDs at the Bank. According to Lewis' testimony, in their initial conversation, he and Thomason specifically discussed pledging the securities in Lewis' defined benefit plan as collateral for the loan:

> Q (Lewis' Attorney): [W]hat did [Thomason] say he wanted for collateral?
> A(Lewis): Well, I had told him - at that point, I told him I had a . . . defined benefit plan, is the only other thing I had that could be used as liquid collateral, because he was asking for liquid collateral. . . .
>
> Q: What did [Thomason] say when you told him you had a defined benefit plan?
> A: He jumped right on it and said, I'll take it and place it in CDs' and charge you two-percent interest.

Lewis also testified that, in that initial conversation, Thomason affirmatively misrepresented the tax consequences of pledging the securities in his defined benefit plan as collateral:

> Q (Lewis' Attorney): Okay. In that initial conversation [with Thomason], did you ask him, will this remain tax-exempt status?
> A (Lewis): Yes, I did.
> Q: And what did he say?
> A: He assured me that it would.

Thus, contrary to the majority opinion's reasoning, it is clear from Lewis' testimony that Thomason made his "assurance" of tax-exempt status in response to Lewis' question about whether his retirement funds could be pledged as collateral without incurring taxes.

The majority opinion also reason that, "[v]iewing the circumstances in their entirety," including Lewis'

"business background and familiarity with retirement accounts," his "access to professional accountants," the large amount of money involved in the transaction, and "the ambiguous notice of Thomason's 'assurance'." Lewis' decision to enter into the transaction "without undertaking additional investigation into its tax consequences was not justifiable." It suggests that Lewis' fraud claim fails because he "blindly" relied on Thomason's assurance of tax-exempt status, even though he should have been forewarned by a number of "red flags" – such as the fact that a letter he received from the Bank summarizing the proposed loan transaction stated that the collateral must be "in a form acceptable to" the Bank, but makes no reference to sheltering Lewis from the tax consequences of the transaction, and the fact that none of the loan documents characterized the CDs as IRAs or as tax-deferred.

Because the issue of justifiable reliance is a close question in this case, I simply cannot agree with the majority opinion that no reasonable jury could have concluded that Lewis justifiably relied on Thomason's assurance of tax-deferred status. Even assuming that the "red flag" occurrences cited by the majority opinion can be fairly characterized as "red flags," there is nothing in the record which suggests that Lewis' "business background" and/or "familiarity with retirement accounts" made him qualified to recognize these particular "red flags." Lewis is not an expert in tax law or investment planning. Nor is it obvious why a person like Lewis should not be able to trust a bank loan officer's assurance that money transferred to the loan officer's

bank will be placed in tax-deferred instruments. A reasonable jury could have concluded that, even though Lewis had access to tax professionals during the relevant time period, Lewis did not know or understand that he would need to call upon those tax professionals to check the veracity of Thomason's assurance to him that the money transferred to the Bank would be place in tax-deferred instruments. After all, Lewis testified that no person at the Bank ever warned him that, if he pledged this money as collateral, it would be taxable, even if placed in IRA CDs. And, although the letter from the Bank, stating that the collateral must be "in a form acceptable to" the Bank, did not positively confirm that the transferred funds were being placed in tax-deferred instruments, this letter did *not* specifically indicate that the money would be placed in *non*-tax deferred instruments. Moreover, contrary to the conclusion reached by the majority, it is not obvious that Lewis should have seen it as a "red flag" when the loan documents presented to him did not specifically indicate that the CDs to be pledged as collateral would be tax-exempt, IRA CDs. Lewis testified that Thomason not only assured him that his retirement funds would be placed in tax-deferred instruments, but also specifically told him that he did not need to sign any "forms" to set up an IRA.[10] Because it was not unreasonable for the jury

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[10]On direct examination, Lewis testified that Thomason told him that he did not need to sign any forms to set up an IRA:

> Q (Lewis' attorney): You were asked if you - and

to infer from the evidence that Lewis justifiably relied on Thomason's "assurance" of tax-exempt status, we should refrain from overturning its verdict on this ground. *See Richter v. Bank of America*, 939 F.2d 1176, 1187 (5th Cir. 1991)(deferring to the jury's reasonable inferences from

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the way the question was asked concerned signing forms. Did you believe that, when your money left the defined benefit plan from Shearson, that it had been transferred into an IRA.

A (Lewis): Yes, I did.

Q: And why did you believe that?

A: Well, because of what I was told [by Thomason]

Q: Did you ask Mr. Thomason where the forms were?

A: Yes, I did.

Q: Did he tell you, there are no forms coming?

A: Eventually, that was his last statement, yes.

. . .

Q: I'm sorry. At what time, what did he tell you precisely?

A: He said, I've checked into it, and there's – there are no forms that you need to sign.

the evidence in a case where the justifiable reliance issue was "close").

For the foregoing reasons. I do not agree with the majority's decision to reverse the judgment in its entirety. I fear that, in concluding that Lewis failed to present sufficient evidence in support of his fraudulent inducement claim, the majority has lost sight of our traditionally deferential standard of review for jury verdicts, as well as our duty to "draw[] all reasonable inferences and resolv[e] all credibility determinations in the light of the most favorable to the non-moving party" when reviewing the district court's ruling on a motion for judgment as a matter of law. *Mississippi Chemical Corp.*, 287 F.3d at 365. I, therefore, respectfully dissent.

APPENDIX D - OPINION ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 6, 2003

UNITED STATES OF COURT OF APPEALS FOR THE FIFTH COURT

No. 02-10605

BILLY LEWIS,
Plaintiff - Appellee/Cross - Appellant,

VERSUS

BANK OF AMERICA NA, Etc; ET AL,
Defendants,

BANK OF AMERICA NA, formerly known as Nationsbank of Texas NA; MARK THOMASON; WALTER F. SMITH, JR.; SALLY WALTERS,
Defendants - Appellants/Cross - Appellees.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Opinion September 2, 2003, U.S. 5th Cir. 2003, ___F.3d____.

Before DAVIS, CYNTHIA HOLCOMB* HALL and EMILIO M.GARZA, Circuit Judges.

PER CURIAM:

Appellee/Cross-Appellant, Billy Lewis("Lewis") complains that, inter alia, we misstated Texas law when we said that the "failure to disclose information is not actionable 'misrepresentation' under Texas law, absent a fiduciary relationship." Lewis cites *Union Pacific Resources Group, Inc. v. Rhone*, 247 F.3d 574 (5th Cir. 2001), which states that

> A duty to speak arises by operation of law when (1) a confidential or fiduciary duty relationship exists between the parties; or (2) one party learns later that his pervious statement was false and misleading; or (3) one party knows that the other party is relying on a concealed fact and does not have an equal opportunity to discover the truth; or (4) one party voluntarily discloses some less than all material facts, so that he must disclose the whole truth, i.e., all material facts, lest his partial disclosure convey a false impression.

Id. At 586 (5th Cir 2001)(citing *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 670 (Tex. App. - Forth Worth 1998, pet. denied)). We agree that the above quote from *Rhone* correctly states current Texas law.

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*Circuit Judge of the Ninth Circuit, sitting by designation.

Lewis argues that the Bank's loan officer Mark Thomason ("Thomason") had a duty to disclose the taxability of the new account under the forth prong of *Rhone* as stated above. Assuming without deciding that Thomason knew the tax consequences of this transaction and had an obligation to advise Lewis accordingly, Lewis still has not satisfied the requirement that he was justified in relying on Thomason for tax advice.

The petition for panel rehearing is denied. Judge Garza would grant rehearing for reasons stated in his Dissent.

No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. And 5th Cir. R. 35) the Petitions for Rehearing En Banc are also DENIED.